ABDUL GHANI HAROON

v.

KETUA POLIS NEGARA & ANOTHER APPLICATION

HIGH COURT MALAYA, SHAH ALAM
HISHAMUDIN YUNUS J
[CRIMINAL APPLICATION NOS: 44-9-2001 & 44-10-2001]
4 MAY 2001

PREVENTIVE DETENTION: *Detention - Application for habeas corpus - Right to appear in court for hearing of application - Whether a constitutional right - Whether there are compelling reasons not to produce detainee in court - Federal Constitution, art. 5(1), (2) - Internal Security Act 1960, s. 73(1)*

CONSTITUTIONAL LAW: *Fundamental liberties - Habeas corpus - Right to appear in court for hearing of habeas corpus application - Whether a constitutional right - Whether there are compelling reasons not to produce detainee in court - Federal Constitution, art. 5(1), (2) - Internal Security Act 1960, s. 73(1)*

ADMINISTRATIVE LAW: *Remedies - Habeas corpus, application for - Whether a constitutional right - Right to appear in court for hearing of application - Whether a constitutional right - Whether there are compelling reasons not to produce detainee in court - Federal Constitution, art. 5(1), (2) - Internal Security Act 1960, s. 73(1)*

The two applicants herein who have been detained under s. 73(1) of the Internal Security Act 1960 applied (through their family members) to the High Court for the writ of *habeas corpus* to challenge their detentions. The Deputy Registrar of the High Court then served on the respondent a notice to produce the applicants in court for the hearing of their applications. The respondent refused to comply with the notice, contending that the applicants have no right in law to be present at the hearing. Hence, the preliminary issue before the court was whether the applicants have a right to be present in court for the hearing of their *habeas corpus* applications.

Held:

[1a] The right to apply to the High Court for the writ of *habeas corpus* is not a mere legal right but also a constitutional right enshrined in art. 5(2) of the Federal Constitution and available to any person who believes that he has been unlawfully detained. Consequently, the detainee also has the constitutional right to be present in court at the hearing of his application for the writ of *habeas corpus*.

[1b] Every detention is *prima facie* unlawful and the burden is on the detaining authority to justify the detention. If the detaining authority objects to the presence of the detainee in court (for his *habeas corpus* application), then strong and compelling reasons must be given to the court.

[Applicants to be produced in court for hearing of habeas corpus applications.]

Case(s) referred to:
Dewan Undangan Negeri Kelantan v. Nordin Salleh [1992] 2 CLJ 1125 ***(refd)***
Minister for Home Affairs, Malaysia & Anor v. Karpal Singh (No 2) [1988] 3 MLJ 85 ***(dist)***
Minister of Homes Affairs v. Fisher [1980] AC 329 ***(refd)***

Legislation referred to:
Federal Constitution, art. 5(1), (2)
Internal Security Act 1960, s. 73(1)
Internal Security (Detained Persons) Rules 1960, r. 93(1)

For the applicants - R Sivarasa (Kamarul Hisham, Kandasamy Palaniandy, Saiful Izham, Hamidzun Khairuddin with him); M/s Selvam Shanmugam & Partners
For the respondent - Abdul Wahab Mohd SFC (Abdul Rashid Sudin SFC with him)

Reported by Gan Peng Chiang

JUDGMENT

Hishamudin Mohd Yunus J:

Encik Abdul Ghani Haroon and Encik Gobalakrishnan a/l Nagappan are officials of the political party, Parti Keadilan Nasional. They had been separately arrested under s. 73(1) of the Internal Security Act 1960 (the ISA). Encik Gobalakrishnan was arrested at 11.50pm on 10 April 2001 at the Kuah Police Station, Langkawi, whilst Encik Abdul Ghani was arrested at 10.25am on 11 April 2001 at the Kuching International Airport.

The families, on behalf of the two detainees, have separately applied to this court for a writ of *habeas corpus*, through Criminal Application 44-9-2001 and Criminal Application 44-10-2001. The supporting affidavit of Encik Ghani's application is deposed by his wife Puan Roslijah binte S. Syed, whilst the supporting affidavit for Encik Gobalakrishnan's application is deposed by his brother, Encik Deven a/l Nagappan. By consent, these two applications have been consolidated and are being heard together.

The common respondent in the applications is the Inspector General of Police.

A few days before the commencement of the hearing on 23 April 2001, the Deputy Registrar of this court had caused to be issued and served on the respondent a "Notice to Produce" so that the applicants could be present at the hearing of their applications. This is the normal practice of this court in all *habeas corpus* proceedings. But the respondent has failed to comply with the order. The respondent has no intention to disobey the court's order. The position taken by the respondent is that, in law, the applicants have no right to be present at the hearing of their applications.

The applicants contend otherwise.

Thus there is a preliminary issue before this court. In law do the applicants have the right to be present at the hearing of their applications?

Encik Sivarasa for the applicants insists that they have the right to be present.

The learned Senior Federal Counsels, Encik Abdul Wahab and Encik Abdul Rashid Sudin, on the other hand, submit that they have no right, citing *Minister for Home Affairs, Malaysia & Anor v. Karpal Singh (No 2)* [1988] 3 MLJ 85.

Now art. 5(1) of the Federal Constitution states:

Liberty of the person

5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

Then cl. (2) of art. 5 provides:

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

The learned Senior Federal Counsels further argue that the words "... shall order him to be produced before the court and release him" mean that the court may only order the production of the detainee in court when the court has made a decision that he should be released.

With respect, I cannot accept this argument. On the principle of interpretation that should be adopted in interpreting constitutional provisions pertaining to fundamental rights, the Bermuda case of *Minister of Homes Affairs v. Fisher* [1980] AC 329 is instructive. In this case which concerned fundamental rights and freedom guaranteed by the Bermuda Constitution, Lord Wilberforce, on behalf of the Privy Council, said that the Constitution should be given "a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the (fundamental liberties) referred to."

The above principle was adopted by our Supreme Court in *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh* [1992] 2 CLJ 1125 where Abdul Hamid Omar LP said (at p. 1130):

> Secondly, as the Judicial Committee of the Privy Council held in *Minister of Home Affairs v. Fisher* at p. 329, a constitution should be construed with less rigidity and more generousity than other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used.

In my judgment, by virtue of cl. (2) of art. 5, the right to apply to the High Court for a writ of *habeas corpus* is not merely a legal right but also a constitutional right available to any person who believes that he has been unlawfully detained. The right being a constitutional right, I think it should follow that he has every right to be present in court at the hearing of his application. In other words, the right to be present is a constitutional right implicit in cl. (2) of art. 5. That should be the proper construction of the provision. Otherwise, how else is a detained person to exercise his constitutional rights under art. 5 cl. (2) to the fullest if he is prevented from attending the court hearing of his *habeas corpus* application. It must not be forgotten that the detainee is a party to the proceeding; and that the cardinal principle is that every detention is *prima facie* unlawful and the burden of proof is on the detainer to justify it. The detaining authority should make the necessary arrangements to ensure his attendance in court. If the detaining authority were to object to his production in court, such objection shall not be entertained by the court unless strong and compelling reasons are furnished to the court by the objecting party. In the present case I see no strong and compelling reasons being produced.

As regards the case of *Karpal Singh (No 2)*, with respect the case can be distinguished. There the Supreme Court was only concerned with the interpretation of r. 93(1) of the Internal Security (Detained Persons) Rules 1960 whereas in the present case we are concerned with the interpretation of art. 5(2) and not with r. 93.

On this ground alone it is sufficient for me to dispose of the preliminary issue as to whether or not the detainees have the right to be produced in court for the purpose of their *habeas corpus* applications.

Accordingly, the applicants are to be produced in court at the continued hearing of this *habeas corpus* proceeding and the Deputy Registrar of this court shall caused to be issued and served on the respondent a fresh Notice to Produce.